FILE COPY

No. 70

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1959

LARRY JOE MILLER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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---

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on the 29th day of December, 1959.

Petition for Rehearing was timely filed and overruled on the 22 day of January 1960, thereafter, Motion to Stay the Mandate was granted by the Court of Appeals.

CITATIONS TO OPINION BELOW

The case was reported in F. 2d (printed in Appendix A).

JURISDICTION

The jurisdiction of this Court is invoked by *Title 28, Sec. 1254 (1), 62 Stat. 928.*

QUESTIONS PRESENTED

1. Did the Court err in failing to reveal the identity of the informer?

   (a) Were the Court's comments relating to this question harmful to the Petitioner's case?

2. Was the indictment defective in failing to allege that the accused was a person required to pay the tax and the manner of the transfer of the marijuana?

   (a) Was the indictment sufficient to permit a plea of former jeopardy?

STATUTES INVOLVED

Title 26, Sec. 4744a, U. S. C. A.

STATEMENT OF THE CASE

Petitioner timely made a motion to produce witnesses requesting that the Government produce the informer. (R. 4, 5, 6.) The Court failed to comply with the motion and overruled same. Thereafter, during the examination of Police Officer, B. L. Beatty, Petitioner sought to compel the Government to reveal the identity of the informer and the Court refused said motion. (R. 55.)

The Trial Court stated as follows:

"Under most any other state of affairs he would be entitled to it, but where, in the light of recent exper-

> ience and judicial observation, the man's life would be put in danger if his name was disclosed, we feel, that in the light of the footnotes, as shown in the Estep decision that we will deny the request."

Thereafter, Petitioner duly excepted to the Court's ruling.

It was material to the issue of the guilt or innocence of Petitioner to produce said informer as a witness in this case for the following reasons:

1. Police Officer, B. L. Beatty received said information in person from the informant on September 16, 1958, the day prior to the date charged in the Indictment. This officer testified only one man in the car.

2. The informant knew the location of approximately 1,527 grains of marijuana in an uninhabited portion of Dallas County, Texas. (R. 54.) Subsequent search confirmed the veracity of the information as to location.

3. Federal Agent Murray Brown in his affidavit—expressly swore that the informant told the officers that *Larry Joe Miller owned the marijuana* concealed on an unnamed road about a quarter of a mile east of Wynnewood Road within thirty yards of Celestial Road in Dallas County, Texas. (R. 166.) (R. 167.) (R. 224, 225.) (Emphasis ours.)

4. Two people were in the car. The other man was not recognized. (R. 117.) (Stroud.) This other man could have been the informer.

Petitioner would point out that the question of his identity as the possessor of the marijuana was closely contested. An important element of the Government's case was that Petitioner was a transferee required to pay the tax. In this connection, it would behoove the government to prove the transfer upon which the tax was required. Therefore, the production of the informer was necessary in order to establish who had transferred the marijuana to Petitioner and whether a tax was due thereon. Absent the identification of Petitioner by the police officers at the scene, the witness who would really know how the marijuana was transferred and to whom it belonged was the anonymous informer. The affidavit of Federal Agent Murray Brown establishes that the informer did know who the marijuana belonged to.

Being tipped off by an informer, Dallas Police Officers and a federal narcotics agent located a quart Miracle Whip jar secreted in a leaf-covered hole several feet off a dirt road described as intersecting and dead-ending Celestial Road near a cemetery in an uninhabited area in Northern Dallas. The jar contained approximately 1527 grains of marijuana, as laboratory tests subsequently confirmed.

Detectives Beatty and Stroud and Special Agent Brown concealed themselves in the underbrush around the location and began the first lap of what was to be a 30 hour vigil. At 6:45 the following evening, the original officers —Beatty, Stroud and Brown, all of whom had been relieved but had returned for the climax—saw a 1955 white

Cadillac on Celestial Road turn onto the dirt road and continue on it past the location of the jar down to the cemetery. It turned around and stopped near the spot where lay the jar still carefully concealed. Leaving the motor running, the driver got out and went directly to the leaf-covered hole and picked up the jar. Detective Beatty shouted "Police" and ordered him to halt. The driver bolted to the Cadillac and driver and car roared down the dirt road. Detective Stroud jumped in the path of the oncoming car waving his arms. As the Cadillac bore down, Stroud leaped back out of the road and it sped by him. Just before, the driver hurled the jar of marijuana through the open car window. The driver attempted a precarious 90 degree turn onto Celestial Road. Detective Stroud was back on the dirt road with a .12 gauge shotgun and blasted away four times at the tires of the Cadillac. The automobile swerved dangerously but somehow made the turn and sped away.

Later that evening, the Cadillac was found parked on a street in Dallas in front of the home of the adoptive parents of the 18-year-old accused, Larry Joe Miller. The car belonged to Larry Joe's mother. Several days later Larry Joe voluntarily surrendered to the police in another city after a newspaper article appeared stating that Larry Joe was being sought by the Dallas police. Detective Beatty and Agent Brown both testified that they had known Larry Joe previously and that he was the driver of the Cadillac. Detective Stroud testified that although he had not known Larry Joe previously he was able to identify Larry Joe as the driver.

On cross-examination of Detective Beatty, counsel for Larry Joe elicited the fact that a confidential informer communicated in person to Detective Beatty. It was this information which enabled the police to find the hidden jar of marijuana. On the ground of the Government's privilege against disclosure of the identify of an informer, the District Judge refused a demand for the name of the informer. Petitioner asserts this ruling is reversible error.

REASONS FOR GRANTING THE WRIT

I.

THE INFORMER QUESTION

Petitioner has brought himself within the scope of Supreme Court Rule 19, Section 1, (b), in that there is a conflict between the decision of the Court of Appeals in Petitioner's case and the following cases:

Roviaro v. U.S., 353 U.S. 53, 77 S.Ct., 623, 1 L. Ed. 2d 639;

U. S. v. Conforti, 200 F. 2d 365, 7 C.C.A.;

Sorrentino v. U. S., 163 F. 2d 627, 9 C.C.A.;

Gilmore v. U. S., 256 F. 2d 565, 5 C.C.A.

Petitioner relies upon *Roviaro v. U. S., 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639.* It was there held that, where the informer could be in a position to give evidence as to the guilt or innocence of the accused, it was for the accused to determine whether the informer should have been interviewed and whether to use him as a witness or not. It

was held to be prejudicial error to withhold the identity of the informer where it was shown that he was in a position to amplify or contradict the Government's case. It was also held that the Government had the choice of revealing the identity of the informer or of dismissing the prosecution. It is interesting to note that the accused in *Roviaro* stood convicted only upon a count involving possession and that the count charging a sale to an informer had been abandoned by the Government. This court, nevertheless, held that it was reversible error to fail to produce this witness who, by the circumstances proven, must have had knowledge of the guilt or innocence of the accused.

In the case at bar the information amounted to much more than a mere tip which was the basis of a search. There was exact knowledge as to location (confirmed) added thereto was specific information as to ownership (unconfirmed).

In *Gilmore v. U. S., 256 F. 2d 565*, the Court of Appeals Fifth Circuit held that the identity of the informer must be revealed where his testimony would amplify or contradict the Government's case. It is interesting to note that, in this decision, there was no evidence offered by the Defendant. The charge was the sale of narcotics and the informer had set the stage by telling the Defendant about one Morris (federal agent) who desired to purchase narcotics. The evidence established that the informer was present during part of the conversation between Morris

and the Defendant in this case. Judge Brown — in the opinion of the Court—stated:

> "as anonymous was a principal actor before and during this performance whose evidence would certainly have been material and relevant. In this testimony might have been the seeds of innocence or substantial doubt, or overwhelming corroboration as the inferences from it covered the full spectrum from innocence to guilt, the process of truth finding compelled its disclosure."

Citing:

Portomene v. U. S., 221 F. 2d 582, 5 C. C. A.;

U. S. v. Conforti, 200 F. 2d 365, 7 C. C. A.;

Sorrentino v. U. S., 163 F. 2d 627, 9 C. C. A.

The foregoing authorities support Petitioner's contention that the disclosure of the identity of the informer should have been compelled by the Court. Petitioner would distinguish those cases wherein the information imparted was of a general nature and would probably have not been admissible on the question of guilt or innocence of the accused. See the *Sorrentino* case, supra. However, in Petitioner's case, the evidence established that the knowledge of the informer would have been material to Petitioner's guilt or innocence. This informer personally gave the information the day prior to Petitioner's arrest. This informer told the police officer that Larry Joe Miller, Petitioner, possessed fifteen hundred and some odd grains of marijuana and that he had hidden same in a remote, uninhabited spot in

Dallas County, Texas. This informer further had sufficient knowledge to know the exact location of said marijuana in a heavily populated county of many hundred square miles. Therefore, a witness who really knew as to whether the Petitioner was guilty or innocent of acquiring marijuana without having paid the tax was the anonymous informer. The Government had the burden of proving more than the acquisition of lost or abandoned marijuana. Thus, the failure of the Court to compel the disclosure of the identity of the informer removed from the case the only witness who really knew whether the Petitioner was guilty or not of a Federal offense. Petitioner has shown that another person was in position to elucidate the transaction. (Other occupant of the car R-117.) It is only necessary for the defense to show possibility of knowledge by the informer, not probability. Cf. *Roviaro.*

As this Court has said:

> "the desirability of calling John Doe as a witness or at least interviewing him in preparation for trial, was a matter for the accused rather than the Government to decide." Cf. *Roviaro.*

The comments of the Trial Court concerning the failure to produce the informer call for the exercise of the supervisory powers of this Court in the interests of the administration of Criminal Justice. (R. 55, 56.) *Quercia v. U. S.*, 289 U. S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321.

Because of the conflict of decisions between the Courts of Appeal and this Court, the writ should be granted.

II.

DID THE COURT ERR IN FAILING TO DISMISS THE INDICTMENT?

Petitioner brings himself within the scope of Supreme Court Rule 19, Section 1, sub-section b, in that the decision of the Court of Appeals in sustaining the indictment is a departure from the accepted and usual course of judicial proceedings, so as to call for an exercise of this Court's powers of supervision.

The sufficiency of the indictment in Petitioner's case is an important question to all Federal prosecutions for a violation of the marijuana tax act. The sufficiency of the indictment in Petitioner's case involves an important question of Federal Law. This Court has often intervened where Federal Jurisdictional and Procedural Issues were involved in order to insure the proper administration of criminal justice in the Federal Courts. *McNabb v. U. S., 318 U. S. 332, 341, 63 S. Ct. 608, 87 L. Ed. 819.*

Petitioner moved to dismiss the Indictment (R. 3, 4) on the following grounds:

1. The Indictment charged no offense against the laws of the U. S. for the reason that it did not allege that Petitioner was a person required to pay the transfer tax nor did the Indictment allege the manner of the transfer involved.

After the Court overruled the motions to dismiss the Indictment, the Government, without request, filed two

contradictory bills of particulars (R. 7, 8, 9). In the first bill of particulars, it was alleged that Petitioner acquired the marijuana in an open field (R. 7, 8). In the second bill of particulars, it was alleged that the manner of acquisition of the marijuana was to the Government unknown, i.e., from persons unknown. (R. 9.) Of course, the filing of contradictory bills of particulars could not aid a defective Indictment. The purpose of a bill of particulars is not to supplement or change or correct the Indictment as an Indictment but is to apprise Defendant of what he is expected to meet. *Pipkin v. U. S., 243 F. 2d 491.* It is the rule of law that where a bill of particulars is filed, the Government is bound by the allegations therein with reference to the evidence to be introduced. *U. S. v. Neff, 212 F. 2d 297.*

The Government found itself in the strange position of not knowing what allegation to make in the bill of particulars and, consequently, offering no evidence to sustain either allegation as to the manner of transfer.

The statute here involved, *Title 26, Section 4744(a)*, in substance provides as follows:

> "It shall be unlawful for any person who is a transferee required to pay transfer tax imposed by Section 4741a(1) to acquire or otherwise obtain any marijuana without having paid such tax or (2) to transport and conceal or in any manner facilitate the transportation or concealment of any marijuana so acquired or obtained * * * proof of reasonable notice and demand to produce the order forms and failure to so produce said order forms is presumptive evidence of guilt."

A careful examination of the statute will reflect that the Indictment at a minimum must charge:

1. That the accused was required to pay the tax (not subject to pay the tax). Emphasis ours.

2. The manner of transfer of the marijuana or that said manner of transfer was to the grand jury unknown (this allegation being necessary to allege an unlawful transfer per se). Emphasis ours.

The Supreme Court of the United States in *Hagner v. U. S., 285 U. S. 427, 431, 76 L. Ed. 861,* has held that the test as to the sufficiency of an Indictment is:

1. Does it allege all of the elements of offense in statutory language?

2. Is it sufficient to inform the Defendant of what he must be prepared to meet in the event of another proceeding against him for the same act?

3. Would the Indictment support a plea of acquittal or conviction?

The Indictment in the case at bar, when measured by this yardstick, is defective. The Court of Appeals, Fifth Circuit, held in *Vogt v. U. S., 156 F. 2d 308, 310,* that an Indictment should allege the manner of transfer or that same was to the grand jury unknown. In *Braswell v. U. S., 200 F. 2d 597, 5 C. C. A.*, a reading of the transcript reveals that the Indictment in that case, which arose in the same Trial

Court, properly alleged that the manner of transfer was to the grand jurors unknown and was impliedly approved by the Court of Appeals. It is also significant that the old marijuana law and the new statute contains the same language except with reference to the transportation.

Generally an Indictment which follows the statutory wording of the statute is deemed to be sufficient. However, where the elements of the offense include matters not in the statutory definition, they must be alleged. *Babb v. U. S., 218 F. 2d 538, 5 C. C. A.* This case is analogous to the case at bar in that there, the matter omitted was the nature of the illegal importation contrary to law of the cattle into the U. S. and, in the case at bar, the nature of the transfer of the marijuana—as to whether it was legal or illegal.

As to the other defect of the Indictment, every case examined by Petitioner reveals that the Indictment must allege that he was required to pay the tax. See *Cratty v. U. S., 163 F. 2d 844, D. C.* The federal rules of criminal procedure require that defects of the type urged in Petitioner's Motion to Dismiss must be timely presented to the Trial Court. *Vasquez v. U. S., 229 F. 2d 288, 5 C. C. A.*

Suppose there had been more than one transfer of marijuana on the date alleged—How could the Petitioner be protected from another prosecution under the Indictment in this case?

The importance of this question merits the grant of certiorari in this case.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

CHARLES WILLIAM TESSMER,
702 Texas Bank Building,
Dallas, Texas,
Attorney for Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that on the day of 1960, I mailed two copies of this Petition, postage prepaid, to the Solicitor General of the United States, at his office in Washington, D. C., and a copy, postage prepaid, to the United States Attorney, at Dallas, Texas.

CHARLES WILLIAM TESSMER

APPENDIX A

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17629

LARRY JOE MILLER, *Appellant,*

versus

UNITED STATES OF AMERICA. *Appellee.*

Appeal from the United States District Court for the Northern District of Texas.

(December 29, 1959.)

Before RIVES, Chief Judge, and BROWN and WISDOM, Circuit Judges.

BROWN, Circuit Judge: The principal issue in this appeal from a conviction for illegal possession and transportation of narcotics, 26 U.S.C.A. §4744(a)(1) & (2), concerns the Government's privilege against disclosure of the identity of an informer who brought criminal information to the police.

Being tipped off by an informer, Dallas police officers and a federal narcotics agent located a quart Miracle Whip jar secreted in a leaf-covered hole several feet off a dirt road described as intersecting and dead-ending Celestial Road near a cemetery in an uninhabited area in northern Dallas. The jar contained approximately 1527 grains of marijuana, as laboratory tests subsequently confirmed. Detectives Beatty and Stroud and Special Agent Brown concealed themselves in the underbrush around the location and began the first lap of what was to be a 30-hour vigil. At 6:45 the following evening, the original officers—Beatty, Stroud and Brown, all of whom had been relieved but had returned for the climax—saw a 1955 white Cadillac on Celestial Road turn onto the dirt road and continue on it past the location of the jar down to the cemetery. It turned around and stopped near the spot where lay the jar still carefully concealed. Leaving the motor running, the driver got out and went directly to the leaf-covered hole and picked up the jar. Detective Beatty shouted "Police" and ordered him to halt. The driver bolted to the Cadillac and driver and car roared down the dirt road. Detective Stroud jumped in the path of the on-coming car waiving his arms. As the Cadillac bore down, Stroud leaped back out of the road and it sped by him. Just before, the driver hurled the jar of marijuana through the open car window. The driver attempted a precarious 90° turn onto Celestial Road. Detective Stroud was back on the dirt road with a .12 gauge shotgun and blasted away four times at the tires of the Cadillac. The automobile swerved dangerously but somehow made the turn and sped away.

Later that evening, the Cadillac was found parked on a street in Dallas in front of the house of the adoptive parents of the 18-year-old accused, Larry Joe Miller. The car belonged to Larry Joe's mother. Several days later Larry Joe voluntarily surrendered to the police in another city after a newspaper article appeared stating that Larry Joe was being sought by the Dallas police. Detective Beatty and Agent Brown both testified that they had known Larry Joe previously and that he was the driver of the Cadillac. Detective Stroud testified that although he had not known Larry Joe previously he was able to identify Larry Joe as the driver.

I.

On cross examination of Detective Beatty, counsel for Larry Joe elicited the fact that a confidential informer communicated in person to Detective Beatty. It was this information which enabled the police to find the hidden jar of marijuana. On the ground of the Government's privilege against disclosure of the identity of an informer, the District Judge refused a demand for the name of the informer. Appellant asserts this ruling is reversible error.

The Government's privilege in a criminal prosecution is subject to the important qualification that when evidence of the identity of the informer or contents of his communications "may be relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause,"

the court will require the disclosure, and if it is still withheld, will dismiss the prosecution.[1]

The standard for determining when the privilege must give way to the needs of the accused is laid down in *Roviaro v. United States.*[2] "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

We think that the circumstances of this case differ crucially from those cases in which disclosure was required. We hold that it was not error to refuse to require the Government to divulge the identity of its source of information.

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[1]Roviaro v. United States, 1957, 353 U.S. 53, 60-61, 1 L.Ed.2d 639, 645, 77 S.Ct. 623; Gilmore v. United States, 5 Cir., 1958, 256 F.2d 565; Portomene v. United States, 5 Cir., 1955, 221 F.2d 582. See McCormick, Evidence §148 (1954).

"Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication. E. G. Scher v. United States, 305 U.S. 251, 83 L.Ed. 151, 59 S.Ct. 174; United States v. Li Fat Tong (CA2nd NY) 152 F.2d 650; Wilson v. United States (CA3dDel) 59 F.2d 390; United States v. Keown (DC Ky.), 19 F.Supp. 639." Roviaro v. United States, supra. In those cases, "[t]he question is one of balancing the public interest in law enforcement against the policy of discouraging unreasonable searches and seizures." McCormick, Evidence §148, note 11 at page 311 (1954).

[2]353 U.S. 53 at 62, 1 L.Ed.2d 639 at 646, 77 S.Ct. 623 at (1957)

Here we are dealing with an individual who, knowing that someone has committed or is about to commit a crime, communicates that knowledge to the police who, acting independently, go to the scene and procure evidence of the crime. We are not dealing with one who was an active participant in the crime nor with one whose presence gave the "atmosphere of confidence" during critical moments and who would have been able to testify directly about the very transaction[4] constituting the crime. But this is not to say that physical presence at the scene of the alleged crime is conclusive.[5] Neither is this a situation in which the informer is the person with whom the accused is charged to have been dealing, such as an indictment alleging a sale to anonymous with anonymous being the informer.[6] The Government presented its case without mention of the informer; the fact of the existence of an informer was brought out on cross examination. We think all the evidence discloses is that the informer was an informer and nothing more.

There is some testimony that there was another person in the car with Larry Joe. In response to a statement in the Government's brief that there is no conduct in connection wtih the crime in which an informant could possibly have figured "unless it be contended that the person who

[3]See United States v. Conforti, 7 Cir., 1952, 200 F.2d 365. Sorrentino v. United States, 9 Cir., 1947, 163 F.2d 627.

[4]Gilmore v. United States, 5 Cir., 1958, 256 F.2d 565.

[5]See note 1, supra.

[6]See Portomene v. United States, 5 Cir., 1955, 221 F.2d 582; Sorrentino v. United States, 9 Cir., 163 F.2d 627. Cf. Roviaro v. United States, 1957, 353 U.S. 53, 1 L.Ed.2d 639, 77 S.Ct. 623.

accompanied the defendant in the automobile at the time he committed the offenses * * * was the informant," a Reply Brief for Appellant was filed which stated "it is well within the realm of probability that the second passenger * * * was the informer." But this is but a belated suggestion of a possibility as the record does not, as, for example, it did in *Roviaro* and *Gilmore*, *supra*, reveal any factual basis for the assertion that "it is well within the realm of probability." If the informer's relation to the acts leading directly to or constituting the crime may be assumed from a fertile imagination of counsel, the Government in practically every case would have to prove affirmatively that the informant had not done any such likely acts. Having done that, all would be revealed and the informer privilege, deemed essential for the public interest, for all practical purposes would be no more.

II.

Objection is made to the instruction that failure to produce—upon reasonable notice and demand—the order form required by law (showing the payment of the special transfer tax) is presumptive evidence of guilt. 26 U.S.C.A. §4744(a). The complaint is that appellant was "in jail and unwarned," and therefore the notice and demand were unreasonable. We cannot say that here under all the circumstances it was unreasonable as a matter of law. See *Gondron v. United States*, 5 Cir., 1958, 256 F. 2d 205. Thus, reasonableness was an inquiry properly submitted to the jury.

III.

Citing *Rent v. United States*, 5 Cir., 1954, 209 F. 2d 893, appellant argues that as a matter of law the evidence was insufficient to support a conviction for unlawful possession and unlawful transportation of narcotics since the evidence at most established a mere "fleeting possession." But the *Rent* case does not stand for the proposition that possession for a short time is not sufficient to support a conviction. A short quotation from *Rent* demonstrates that.

> "[The accused's] possession of the one cigarette was a mere fleeting possession, not inconsistent with honest intention or mere curiosity, and his throwing the cigarette away upon being ordered to stop is not, in our opinion, substantial evidence of a guilty knowledge or intent. * * * There was no substantial evidence * * * of criminal intent." *Rent v. United States*, 5 Cir., 1954, 209 F.2d 893, 900.

Manifestly the basis for *Rent* was the complete lack of evidence of criminal intent. To say that under the facts of this case the possession, more accurately described as *fleeing* rather than *fleeting*, is "not inconsistent with honest intention or mere curiosity" is for words to "be used as playthings." *Romero v. International Term. Operat. Co.*, 1959, U. S. , 79 S. Ct. , 3 L. Ed. 2d 368, 386.

IV.

This leaves the objection that there could be no offense committed since the transfer of narcotics came from law enforcement officers who are exempt from paying the transfer tax. 26 U.S.C.A. §4744(a). But on the inferences

which the jury could rightfully draw, the officers had nothing to transfer. Knowledge that the jar of marijuana was in the hole in the ground, or the taking of a small sample for laboratory verification did not make this such a possession by the officers as to constitute them transferors. A defense of entrapment would be an altogether different matter and would not be based on the non-liability of the transferor to pay the special tax.

Appellant urges additional errors including several objections to the instructions given to the jury. We find no merit in any of these complaints.

AFFIRMED.

APPENDIX B

JUDGMENT

Extract from the Minutes of December 29, 1959

No. 17629

LARRY JOE MILLER,

versus

UNITED STATES OF AMERICA.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX C

ORDER DENYING REHEARING

Extract from the Minutes of January 22, 1960

No. 17629

LARRY JOE MILLER,

versus.

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

APPENDIX D

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 17629

LARRY JOE MILLER,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from January 22, 1960; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from January 22, 1960 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an

order of the Supreme Court denying the writ, or upon the expiration of thirty days from January 22, 1960, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JOHN R. BROWN
United States Circuit Judge.

ORDER STAYING MANDATE FILED: February 2, 1960.

Dated:

FILE COPY

Office-Supreme Court, U.S.
FILED
MAR 11 1960
JAMES R. BROWNING, Clerk

No. 708

In the Supreme Court of the United States

OCTOBER TERM, 1959

LARRY JOE MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 708

LARRY JOE MILLER, PETITIONER

v.

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OPINION BELOW

The opinion of the court of appeals (Pet. A., 1–8; R. 244–251) is reported at 273 F. 2d 279.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1959 (R. 252). A petition for rehearing was denied on January 22, 1960 (R. 253–256). The petition for a writ of certiorari was filed on February 15, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court properly refused to require disclosure of the name of an informer who merely

told law officers of the hidden location of marihuana and was not a participant with petitioner in its unlawful acquisition and transportation.

2. Whether the court erred in refusing to dismiss an indictment charging the unlawful acquisition and transportation of marihuana.

STATUTE INVOLVED

26 U.S.C. 4744 provides as follows:

(a) *Persons in General.*

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

* * * * *

STATEMENT

Petitioner was charged in count 1 of an indictment returned in the Northern District of Texas with the unlawful acquisition of 1527 grains of marihuana without having paid the special tax, in violation of 26 U.S.C. 4744(a), *supra*. Count 2 charged the unlawful transportation of this marihuana in violation

of the same statute (R. 1–2). The jury found petitioner guilty on both counts, and he was given a general sentence of imprisonment for five years (R. 227–228). On appeal, the conviction was affirmed (R. 228–229, 252).

The evidence adduced at the trial may be summarized as follows:

On September 16, 1958, a confidential informant told police officer Beaty that petitioner had a quantity of marihuana concealed on an unnamed road near Celestial Road in Dallas, Texas (R. 53–54, 224). Beaty and another officer found a jar buried in a hole covered with leaves a few feet from the unnamed road (R. 29–30). Laboratory tests showed that there were about 1527 grains of marihuana in the jar (R. 172–173). Officers put their initials on the jar from which a sample was taken, the jar was placed back in its hiding place, and the officers began a continuous surveillance (R. 30–33, 37, 175–176). The next day at about 6:45 p.m., petitioner appeared driving a Cadillac with another man as a passenger (R. 39, 66, 101–102, 117, 136–137). Petitioner left the motor running, walked to the leaf-covered hole, and picked up the jar of marihuana (R. 39–42). Beaty identified himself as a police officer and told petitioner to halt since he was under arrest, but petitioner jumped into the car and drove off, making about a ninety-degree turn from the unnamed road to Celestial Road (R. 42–43, 102–103, 137–138). Another officer, Stroud, shouted to the petitioner to stop, but jumped back into the bushes as the car drove by. Stroud fired four shots at the

tires of the car, but petitioner escaped (R. 103–104, 43, 64, 137). As the car was leaving the scene, Stroud saw in the air an object which had been thrown from the car (R. 105–106, 121–122). When this object was recovered, it proved to be the jar of marihuana upon which the officers had placed their initials for identification (R. 44–45, 107, 138–140).

Later that evening the officers found the Cadillac, with bullet holes piercing it and a flat tire, at the home of petitioner's adoptive mother. The officers had gone there for the purpose of arresting petitioner, but he was not found (R. 209, 212, 169, 180). Three days later, petitioner, having seen a newspaper account of his complicity in the crime, voluntarily surrendered to police officers (R. 180).

On September 22, 1958, federal agent Brown served on petitioner a demand for production of the required order form for a legal transfer of marihuana, but petitioner did not produce any such order form (R. 148, 151–153).

Prior to the trial, petitioner made a motion to produce as a witness the informer who had told the police where the marihuana could be found (R. 4–6). This motion was overruled (R. 6). At the trial, defense counsel asked during the cross-examination of officer Beaty for the informer's name so that he might be produced as a witness. The court refused to order the government to produce the witness on the ground that the informer's life might be endangered if his name were disclosed (R. 54–56).

ARGUMENT

1. Petitioner's contention (Pet. 6–9) that the court erred in not requiring disclosure of the name of the informer is based on a misinterpretation of *Roviaro* v. *United States*, 353 U.S. 53. This Court held in *Roviaro* that the question whether the Government is required to disclose the identity of an informer "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Id.* at 62. In *Roviaro* and the lower court cases cited by petitioner, the evidence showed clearly that the informer was an active participant and collaborator with the accused in the illegal transaction and therefore his testimony was highly relevant to the defense. See *id.* at 62, 63–64, note 12. On the other hand, in the instant case there is no indication that the informer was an associate of the accused. The information provided by the informer as to the location of the marihuana did not suggest that he was a participant in the criminal transactions, but merely provided the reason for the officers' surveillance. Just as in *Scher* v. *United States*, 305 U.S. 251, 254, the "source of the information which caused him to be observed was unimportant to petitioner's defense."

The record here does not suggest that the testimony of the informer would have had any substantial importance. Petitioner's counsel neither showed, nor even attempted to show, how the informer's testimony might aid in his defense (see R. 54–56). When the existence of the informer was brought out on cross-examination of officer Beaty, counsel made no effort to establish the extent of the informer's information. Instead, he was satisfied merely to ask for "the name of the informer in this case, that we may have him here as a witness" (R. 55). With the record in this posture and in view of the court's fear, justified by past experience in similar cases, for the informer's life (R. 54–56), proper balancing of the public interest did not require disclosure.[1]

2. The indictment (R. 1–2), apart from the allegations in the bills of particulars,[2] was sufficient. Both counts of the indictment followed substantially the wording of the statute and embodied all the elements of the crime. They fully informed the petitioner of the charges against him, so that he could prepare his

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[1] At the trial petitioner did not claim that the man seen with him in the Cadillac was the informer. His belated contention in the court of appeals and in his petition is completely without support in the record (see Pet. App. A-6).

[2] Contrary to petitioner's assertion (Pet. 11), the two bills of particulars were not contradictory. The first alleged how petitioner acquired the marihuana (the location of which was described) from the depression in the ground and transported the marihuana in the Cadillac (R. 7–8). The second, with regard to the original and different acquisition, merely alleged that the marihuana had been acquired by the petitioner from persons unknown to the government (R. 9).

defense and be in a position to plead the judgment in bar of any further prosecutions for the same offense. Having satisfied these requirements, the indictment was sufficient whether or not it could possibly have contained more definite allegations. See *United States* v. *Debrow*, 346 U.S. 374, 377–378; *Hagner* v. *United States*, 285 U.S. 427, 431; *Bunn* v. *United States*, 260 F. 2d 313, 316 (C.A. 8).

Petitioner's specific contentions (Pet. 10–13)—that the indictment was insufficient because it failed to allege that the accused was "required to pay" the transfer tax or to describe the manner in which the marihuana was transferred—are completely without merit. First, there is no substantial difference between the allegation in the indictment that petitioner was "subject to pay" the transfer tax and the wording in the statute that he was "required to pay" it. Second, the statute does not require the indictment to describe the manner in which the marihuana was transferred. In fact, under 26 U.S.C. 4744, the government need not offer evidence of the transfer even at trial since possession of marihuana and failure to produce the required order form in themselves constitute presumptive evidence of guilt.

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[1] Even now, petitioner does not claim that he was misled or surprised by the alleged defects in the indictment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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